No. 78-1248

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
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On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 63-86) is reported at 590 F.2d 1209 (D.C. Cir. 1978). The origi-

nal opinion and judgment of the Court of Appeals (A. 34-49), which this Court summarily vacated on granting certiorari (A. 62), 434 U.S. 1030 (1978), is reported at 561 F.2d 349, *reh. denied,* 565 F.2d 721 (D.C. Cir. 1977) (*per curiam*). The opinion of the United States District Court for the District of Columbia (A. 21-31) is reported at 400 F. Supp. 848 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1978. The petition for certiorari was filed on February 12, 1979 and was granted on May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States. . . ."

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any),

> and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

Title 28 U.S.C. § 1391 provides in relevant part as follows:

> "(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . ."

QUESTIONS PRESENTED

(1) Does an action initiated pursuant to the Freedom of Information Act ("FOIA") to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not

released the information solely because it has been permanently enjoined from doing so by another federal district court in separate litigation instituted against it by the suppliers of the information?

(2) Has a governmental agency "improperly withheld" information within the meaning of the FOIA (5 U.S.C. § 552(a)(4)(B)) where the defendant agency has not released the information sought by the plaintiffs solely because it has been permanently enjoined from doing so by another district court?

(3)(A) Has the Court of Appeals for the District of Columbia Circuit erred in setting its own district court on a collision course with a district court in another circuit by (a) directing its own district court to determine whether an agency should be compelled to release certain information under the FOIA when the district court in the other circuit has permanently enjoined the agency from releasing the information and (b) suggesting to its district court that it may enjoin the enforcement of the permanent injunction?

(B) Are two sophisticated requesters of information under the FOIA precluded from prosecuting an FOIA action to compel a governmental agency to release information where another district court has permanently enjoined the agency from publicly releasing the information and where the requesters purposely bypassed ample opportunities to intervene in the other district court?

(C) Is the Consumer Product Safety Commission—an agency charged with informing the public of consumer product safety hazards—as a matter of law an inadequate representative in a "reverse-FOIA" action of the interests of FOIA requesters, so that a permanent injunction entered in that action forbidding the Commission from disclosing specified information does not preclude the requesters who chose not to intervene from later prosecuting, in another district court, a FOIA action to compel the Commission to disclose the specified information?

STATEMENT

This Court is being asked to reverse for a second time an order of the United States Court of Appeals for the District of Columbia Circuit setting the District of Columbia District Court on a collision course with the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit.

Almost one year after its first decision was summarily vacated by this Court, the District of Columbia Circuit has once again ordered the District Court to determine whether certain information obtained from the petitioners by the Consumer Product Safety Commission ("CPSC") should be disclosed to plaintiff-respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (collectively "the requesters") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Such disclosure is expressly forbidden by a permanent injunction entered in so-called "reverse-FOIA" litigation instituted against the CPSC by petitioners, in which it was held that disclosure would be misleading to the public and unfair to petitioners and thus is prohibited by Section 6(b)(1) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055(b)(1).

On remand from this Court's order mandating "further consideration in light of the permanent injunction

entered by the United States District Court for the District of Delaware," 434 U.S. 1030 (1978) (A. 62), the Court of Appeals reaffirmed its prior decision directing its District Court to decide the merits of the requesters' FOIA action, *i.e.*, whether the CPSC should disclose the petitioners' information, notwithstanding the final injunction entered against the CPSC in the Delaware litigation. Significantly, the District of Columbia Circuit went so far as to suggest that the District of Columbia District Court consider enjoining petitioners from enforcing the Delaware injunction, if it reaches a conclusion contrary to that reached by the Delaware District Court and subsequently affirmed by the Third Circuit.

A. Background

This proceeding concerns certain "TV-related accident" information which petitioners, twelve television manufacturers, furnished to the CPSC in response to special orders and subpoenas with the request that the data not be disclosed (A. 22-23).

In August 1974, the CPSC informed the manufacturers that the requesters had sought access, pursuant to the FOIA, to the information the manufacturers had supplied (*id.*). At the end of March 1975, the CPSC notified the manufacturers of its decision to release the manufacturers' information (A. 23-24).[1]

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[1] In order to give the CPSC sufficient time to review the voluminous submissions, the requesters had agreed that the CPSC could have until mid-March 1975 to determine whether the requested information would be made available (A. 17, ¶ 7; A. 23). In so agreeing, the requesters reserved the right to consider delay after mid-March 1975 as a denial of their request (*id.*).

B. The Delaware Proceedings

In April 1975 the manufacturers brought suit in various federal district courts against the CPSC to enjoin the threatened disclosure (A. 24). The grounds stated by the manufacturers were that such release was barred, *inter alia,* by exemptions to the FOIA, 5 U.S.C. § 552(b) (1976); by Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1) (1976); and by a provision of the Criminal Code, 18 U.S.C. § 1905 (1976). *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission ("Delaware Preliminary Injunction"),* 404 F. Supp. 352, 365 (D. Del. 1975). In order to expedite handling and ultimate disposition of all twelve actions, they were consolidated before Chief Judge Latchum in the District of Delaware, the majority of them having been brought in that district and the actions filed elsewhere having been transferred there at the request of the CPSC. *Id.* at 357.

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. *Id.* at 358. Then, on October 23, 1975, after extensive briefing and argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the information "in any manner" pending further order of the court. *Id.* at 352. (The Delaware preliminary injunction is reprinted at A. 51.) Judge Latchum preliminarily determined that the CPSC had deliberately subpoenaed unverified and inaccurate information, disclosure of which would be misleading to the public and unfair to the manufacturers, contrary to the requirements of Section 6(b)(1) of the CPSA.[2] *Delaware*

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[2] This provision reads in relevant part:

> "The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which

Preliminary Injunction, 404 F. Supp. at 369-73. The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and permanently enjoined disclosure of the information at issue. ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Delaware Permanent Injunction"***), 443 F. Supp. 1152 (D. Del. 1977).

On the CPSC's appeal, the Third Circuit unanimously affirmed in its entirety Judge Latchum's permanent injunction. ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Third Circuit Affirmance"***), 598 F.2d 790 (3d Cir. 1979) (Seitz, C.J., Gibbons and Higginbotham, JJ.). The Third Circuit held that Judge Latchum did not err in concluding that the CPSC could not release the information without first complying with the requirements of Section 6(b)(1) of the CPSA. *Id.* at 815. The Third Circuit also agreed with the Delaware court's conclusion that Section 6(b)(1) is a withholding statute of the kind described by Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). *Id.* at 814.

Despite timely notice of the Delaware litigation, the requesters deliberately refused to participate in the Delaware District Court proceedings, studiously avoiding many opportunities to intervene on the merits, including the express invitation to intervene extended by Judge Latchum on September 15, 1977 in denying the

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the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this [Act]." 15 U.S.C. § 2055(b)(1).

CPSC's motion to transfer the Delaware cases to the District of Columbia. *See* ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Delaware Transfer Denial"***), 438 F. Supp. 208, 211 n.9, 212 (D. Del. 1977).[3] Although the requesters did participate in the appeal from the Delaware injunction as *amici curiae,* they avoided participating on the merits in that court as well. Instead, *amicus* Consumer Federation of America[4] briefed the question whether the documents should be disclosed under the FOIA (with no objection from the manufacturers),[5] while the requesters limited their participation in the Third Circuit appeal to the assertion that they were necessary or indispensable parties to the district court proceedings under Rule 19 of the Federal Rules of Civil Procedure. *See Third Circuit Affirmance,* 598 F.2d at 813, 797.[6]

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[3] The manufacturers also invited such intervention. *See, e.g.,* Memorandum of Appellees GTE Sylvania, Inc., and Aeronutronic Ford Corp. in Opposition to Motion [of Consumers Union of the United States, Inc., and Public Citizen's Health Research Group] for Leave To File Brief Amicus Curiae, at 5 & Exhibits A, B, and C, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[4] Consumer Federation of America, the largest consumer organization in the United States, is composed of over 225 national, state, and local consumer organizations and represents over 30 million American consumers in various activities before Congress, regulatory agencies, and the courts. Motion of Consumer Fed'n of America for Leave To File Brief as Amicus Curiae, at 1, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[5] The manufacturers did not oppose participation on the merits by *amicus* Consumer Federation of America. *See, e.g.,* Response of Appellees GTE Sylvania, Inc., and Aeronutronic Ford Corp. to Motion of Consumer Fed'n of America for Leave To File Brief as Amicus Curiae, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[6] The requesters asked the Third Circuit to vacate Judge Latchum's permanent injunction and to instruct the Delaware court

In rejecting this contention, the Third Circuit noted that the requesters had had "adequate notice" of and "could have intervened in the Delaware litigation without significant burden" were it not for their admitted "desire to present their case in a forum that was more convenient and perceived as less hostile to their interests." *Id.* at 799. The court concluded that the requesters' decision to raise the Rule 19 issue "only after entry of a final judgment by the district court that was adverse to their interests undermines their contention that the parties' noncompliance with Rule 19 compels this Court to vacate that judgment." *Id.*

C. The District of Columbia Proceedings

After temporary restraining orders had been entered in the manufacturers' actions, the requesters instituted the present FOIA action in the District of Columbia to compel the CPSC to release the information which had been submitted by the manufacturers and which was, as the requesters acknowledged in their complaint, the subject of the Delaware litigation (*see* A. 18, ¶ 10). On September 12, 1975, Judge Richey, of the District of Columbia District Court, dismissed the requesters' action on the grounds that (1) the complaint sought no relief against the television manufacturers and (2) there was no justiciable "case" or "controversy" between the requesters and the CPSC, since those parties agreed that the information at issue should be released to the requesters and thus were not true adversaries.[7] *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission,* 400 F. Supp. 848 (D.D.C. 1975) (A. 21-31). Judge Richey ruled that he should not re-examine or countermand the temporary restraining orders entered in the Delaware litigation, which had been issued by a court of competent jurisdiction concurrent with that of his own (A. 28-29). Judge Richey also explicitly noted that it would be appropriate for the requesters to intervene in the Delaware litigation (A. 31). Rather than pursue this course, however, the requesters remained aloof from the proceedings in Delaware and appealed the dismissal of their complaint.

On July 5, 1977 the District of Columbia (Wright, J., for a panel consisting of himself, Bazelon, C.J., and Robinson, J.) reversed Judge Richey's order and remanded the case with instructions for him to proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed." 561 F.2d 349, 357 (D.C. Cir. 1977) (A. 34-49, at A. 48). The court perceived the necessary "case" or "controversy" in (1) a supposed disagreement between the requesters and the CPSC over whether the then outstanding preliminary injunction entered by Judge Latchum "unequivocally preclude[d]" the CPSC from providing the requesters with the information in question (A. 42)

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either to dismiss the actions or to transfer the litigation to the District of Columbia where they might be joined and where they had instituted their own action (*see* pp. 10-15 *infra*). *Id.* at 797. Having remained aloof from the Delaware District Court proceedings, the requesters never attempted to present to Judge Latchum the Rule 19 issue they pressed as *amici* on the CPSC's appeal. *See id.* at 796-99.

[7] One of the manufacturers, Warwick Electronics, Inc., had moved for dismissal on the additional ground that the court lacked personal jurisdiction over it (Dist. Ct. Record No. 29). In view of its disposition of the case, the District Court found it unnecessary to consider Warwick's motion (A. 30 n.15).

and (2) its suspicion that the CPSC did not really want to release the information because, in the court's view, the CPSC's early conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A. 43 & n.27).[8]

The court further concluded that, in any event, the Delaware litigation had been abandoned and that the preliminary injunction was "dead" (A. 47).[9] The court also held that even if the preliminary injunction were

[8] Notably, the court with first-hand knowledge of the CPSC's conduct of the Delaware litigation sharply disagreed with the Court of Appeals' suspicion. In denying the CPSC's motion to transfer the Delaware cases to the District of Columbia, Judge Latchum described the proceedings leading up to his grant of the preliminary injunction as "a hotly contested battle." *Delaware Transfer Denial,* 438 F. Supp. at 210.

[9] In fact, the preliminary injunction was very much "alive." On August 20, 1976, the Delaware court had issued a "minute order" instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes" (A. 55). The minute order provided:

> "2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this order had not been entered."

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding" (Ct. Appls. Amending Record Order, Nos. 3 & 8, Exhibit D at 11).

These facts were brought to the attention of the Court of Appeals in exhibits that the manufacturers and the CPSC were permitted to lodge (A. 56) with their petitions for rehearing (Ct. Appls. Amending Record Order, Nos. 1-4 & 6-9; *see, e.g.,* A. 50-55).

still in existence, it could not be given preemptive effect because no private party requesting disclosure of the information had participated in the Delaware proceedings and, in the court's view, the CPSC had not adequately represented the pro-disclosure position (A. 47-48). Petitions for rehearing, together with suggestions for rehearing *en banc,* were denied, 565 F.2d 721 (D.C. Cir. 1977) (*per curiam*) (A. 58-61), but the Court of Appeals' mandate was stayed to allow the manufacturers time to file their first petition for a writ of certiorari.

On December 8, 1977 Judge Latchum issued the permanent injunction prohibiting release of the information at issue. *Delaware Permanent Injunction,* 443 F. Supp. at 1163-64. On January 16, 1978 this Court granted the manufacturers' petition for certiorari, summarily vacated the judgment, and remanded the case to the Court of Appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware." *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.* (No. 77-508), 434 U.S. 1030 (1978) (A. 62).

On remand, the requesters and the manufacturers filed motions in January and February 1978 requesting a briefing schedule (Ct. Appls. Amending Record Order, Nos. 10 & 12). However, no action was taken by the court until September 20, 1978, when the parties were directed to submit memoranda "address-[ing] with particularity the question whether the [Delaware] permanent injunction . . . bars [the requesters], who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed" (Ct. Appls. First Record Order, No. 22).

On December 22, 1978 the Court of Appeals issued its second opinion and judgment again rejecting all of the manufacturers' arguments and remanding the case to the District Court to determine whether the information should be disclosed to the requesters. 590 F.2d 1209 (D.C. Cir. 1978) (Robinson, J., for a panel consisting of himself, Wright, C.J., and Bazelon, J.) (A. 63-86). The court expressly adhered to its prior position that the complaint presented a constitutional "case" or "controversy" notwithstanding the entry of the Delaware permanent injunction (A. 72).[10] It then concluded that neither comity nor collateral estoppel barred maintenance of the action because the requesters were not formal parties to the Delaware proceedings (A. 74-78).

In reaching these conclusions, the District of Columbia Circuit doubted that the CPSC could ever represent the interests of FOIA requesters in a "reverse-FOIA" suit so as to preclude later litigation over the same information (A. 74-75). Nor, in the court's view, did the requesters' deliberate refusal to intervene in the Delaware proceedings preclude their collateral attack on the Delaware judgment, because the District of Columbia "is the venue authorized by the FOIA" (A. 65).

Recognizing that its holding set the District of Columbia Court on a collision course with the Delaware Court (A. 78-79), the Court of Appeals blamed the

[10] The court did not address but implicitly rejected the manufacturers' argument, twice endorsed by the Solicitor General before this Court, that since the information at issue had been denied the requesters solely because of the Delaware injunction, it had not been "improperly withheld" by the CPSC within the meaning of the FOIA, 5 U.S.C. § 552(a)(4)(B). *See* Brief for Fed. Respondents in Opposition, at 6, No. 78-1248; Brief for Fed. Respondents in Opposition, at 5, No. 77-508.

conflict on the fact that neither the CPSC nor the manufacturers had joined the requesters as parties to the Delaware proceedings under Rule 19, Fed. R. Civ. P. (A. 79-80), and claimed that the manufacturers could also have avoided the problem by maintaining the Delaware litigation as a "defendant class action against the Commission and all possible requesters" (A. 79). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to "continue toward a decision on the merits" (A. 85), suggesting that its District Court consider enjoining the manufacturers from enforcing their Delaware judgment against the CPSC if the District Court disagreed with the result reached by the Delaware District Court (A. 86). The second judgment of the Court of Appeals thus is identical in terms and effect to its prior judgment which this Court summarily vacated.

The Court of Appeals' mandate was stayed to allow the manufacturers time to file their second petition for a writ of certiorari in this action, which they did on February 12, 1979. On April 30, 1979 the Third Circuit affirmed the Delaware injunction. *Third Circuit Affirmance,* 598 F.2d 790. This Court granted certiorari on May 14, 1979.

SUMMARY OF ARGUMENT

We submit that it is clear the requesters' action should not be permitted to proceed and that any one of the three independent arguments summarized below requires reversal of the judgment of the Court of Appeals and dismissal of the complaint.

1. There is no case or controversy as required by Article III of the Constitution because both the requesters and the CPSC—the only defendant against

whom relief is or can be sought—desire precisely the same result in this case, namely, release of the information in question. Article III limits the business of federal courts to questions presented in the adversary form historically viewed as capable of judicial resolution. The requirement of adverseness ensures sound adjudication and the integrity of the judicial process, both of which depend upon the parties to focus and present fully all relevant facts and arguments.

Whether there is a case or controversy must be ascertained from the initial pleadings. In this case, the requesters' complaint and the CPSC's answer demonstrate that they both stand in the identical position on the ultimate issue in this case. The only reason that the information has not been released to the requesters is because the CPSC has been forbidden from doing so by restraining orders, a preliminary injunction and, most recently, a permanent injunction issued by the Delaware District Court and affirmed in its entirety by the Third Circuit. The consequence of this lack of adverseness is that both the requesters and the CPSC will argue on the merits the identical position and thus engage in a charade not countenanced by Article III.

In the decision on review here, the District of Columbia Circuit adhered to its prior finding of a case or controversy in its first opinion in this case, which this Court summarily vacated just over a year ago. In its first opinion, the Court of Appeals attempted to circumvent the congruence of interests between the requesters and the CPSC in two ways, neither of which can withstand scrutiny.

First, the Court of Appeals contrived a disagreement as to whether the orders entered by the Delaware District Court precluded the CPSC from providing the documents to the requesters. No one has ever disputed that the Delaware orders prohibit the CPSC from releasing the information, and this is not the issue that was remanded for trial. The withholding of the information is attributable to the action of the Delaware court and cannot be laid at the doorstep of the CPSC.

Second, the District of Columbia Circuit challenged the *bona fides* of the CPSC's stated desire to release the documents. This attack obviously has no foundation in fact. Although the Court of Appeals in its subsequent decision upon remand from this Court appeared belatedly to retract its charges against the CPSC, it nevertheless adhered, without further reasoning, to its earlier finding of a case or controversy. This result should not be sanctioned by this Court.

2. The information sought is not being "improperly withheld" by the CPSC. The requesters rely upon the jurisdiction vested in district courts by the FOIA, which provides that a district court "has jurisdiction . . . to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B). There can be no "improper withholding" by an agency that desires to release documents but is forbidden from doing so by a permanent injunction entered by a court of competent jurisdiction. Accordingly, the requesters' complaint fails to state a claim upon which relief can be granted.

Neither 5 U.S.C. § 552(a)(4)(B) nor any other provision of the FOIA provides any basis for con-

cluding that the statute contemplates that a judicial decree permanently enjoining disclosure can be parlayed into a claim of "improper withholding" by the agency. This Court has established that the FOIA does not stand in the way of "reverse-FOIA" suits. *See Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979). It must follow that nothing in the FOIA negates the results of such suits when they are adverse to the agency and to the requester. Furthermore, the legislative history indicates that it was unjustified agency withholding at which the FOIA was directed, not withholding pursuant to a final order of a court of competent jurisdiction.

Moreover, a court exercising jurisdiction under the FOIA retains its inherent equitable power to preserve the integrity of judicial orders by respecting a permanent injunction of a coordinate federal court. This was the appropriate course here, and the District of Columbia Circuit erred in reaching a contrary result.

3. In ordering the District Court to forge ahead on a collision course with the Delaware court, the District of Columbia Circuit ignored the lengthy and hard-fought battle that has already taken place between the manufacturers (arguing against disclosure of the information) and the CPSC (arguing for release of the information).

The decision below would require relitigation in the District of Columbia of the very dispute as to which the manufacturers have finally prevailed in Delaware. The decision also creates for the CPSC the potential dilemma of being subject to two diametrically opposed injunctions from different federal courts, one prohibiting and the other requiring release of precisely

the same information. The District of Columbia Circuit's rationale for such extraordinary results is simply that FOIA requesters should never be bound by an order enjoining a governmental agency from releasing certain information unless they were parties to the case in which the order was entered. This holding is unwarranted and will render meaningless reverse-FOIA actions because of the impossibility of joining all actual and potential FOIA requesters in such actions, a result clearly not within the contemplation of this Court. *See Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979).

In reaching its decision, the District of Columbia Circuit improperly elevated the rights of FOIA requesters over the rights of submitters of information to the government. The court took no account of the strong policy expressed in Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), granting submitters special protection against disclosure of misleading information to the public. It likewise ignored the clear Congressional objective to allow submitters of information to sue the government locally reflected in 28 U.S.C. § 1391(e), instead concentrating its attention exclusively on the venue provisions of the FOIA and the rights of requesters.

Moreover, the District of Columbia Circuit erred in rejecting the argument advanced by the manufacturers and the CPSC that, in light of the permanent injunction entered in the Delaware litigation, the doctrine of comity required that the District of Columbia action not be permitted to proceed and that the requesters be referred to the Delaware District Court to present their claim that the information should be disclosed to them. The court also improperly disre-

garded authorities cited by the manufacturers holding that individuals may be precluded from relitigating matters already determined in a litigation to which they were not parties, especially where the litigation was in the nature of judicial review of an administrative determination.

The result reached by the District of Columbia Circuit in this case is particularly unwarranted considering the undisputed fact that the requesters were well aware of but deliberately refused to participate in the Delaware litigation. Even when they appeared as *amici* in the Third Circuit appeal, the requesters refused to comment on the merits of the Delaware injunction. Despite their failure to intervene, however, their interest in obtaining the information at issue was more than adequately represented by the CPSC, which has vigorously argued in favor of disclosure of the information to them. This vigorous defense of the requesters' interest was echoed by the *amicus* efforts of Consumer Federation of America, a consumer group with attitudes closely aligned with those of the requesters. Given these facts, and the rights of the manufacturers as determined by the Delaware District Court and the Third Circuit, the District of Columbia Circuit's decision should not be permitted to stand.

ARGUMENT

I. NO JUSTICIABLE CASE OR CONTROVERSY IS PRESENTED WHERE AN AGENCY THAT IS PERMANENTLY ENJOINED FROM RELEASING INFORMATION AGREES WITH FOIA REQUESTERS THAT THE INFORMATION SHOULD BE RELEASED.

Judge Richey determined that this litigation did not present the "case" or "controversy" required under Article III of the Constitution because both the requesters and the CPSC, the only defendant against which relief is or can be sought, have always agreed that the information at issue should be released. The Court of Appeals' reversal of this holding is inconsistent with this constitutional provision and, accordingly, cannot be allowed to stand.

Under Article III the jurisdiction of federal courts is restricted to actual "cases" or "controversies." The reasons for this limitation are simply stated:

> "Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." *Flast* v. *Cohen,* 392 U.S. 83, 94-95 (1968).

As an aspect of this dual function, the term "case or controversy" implies the existence of "adverse parties whose contentions are submitted to the court for adjudication." *Muskrat* v. *United States,* 219 U.S. 346, 357 (1911). Accordingly, ever since *Lord* v. *Veazie,* 49 U.S. (8 How.) 251 (1850), it has been settled that where parties "desire precisely the same result . . . [t]here is . . . no case or controversy within the meaning of Art. III of the Constitution." *Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 48 (1971) (*per curiam*). *Accord, Muskrat* v. *United States, supra,* 219 U.S. at 361; *Chicago & Grand Trunk*

Railway v. *Wellman,* 143 U.S. 339, 345-46 (1892); *Granfield* v. *Catholic University of America,* 530 F.2d 1035, 1045 (D.C. Cir.), *cert. denied,* 429 U.S. 821 (1976); *Delaware Women's Health Organization, Inc.* v. *Wier,* 441 F. Supp. 497, 500-01 (D. Del. 1977); *Atlantic Richfield Co.* v. *FTC,* 398 F. Supp. 1, 8 (S.D. Tex. 1975), *aff'd on other grounds,* 546 F.2d 646 (5th Cir. 1976); *Dworman* v. *Mayor of Morristown,* 370 F. Supp. 1056, 1079-80 (D.N.J. 1974). It is under this principle that collusive suits must be dismissed, *e.g., United States* v. *Johnson,* 319 U.S. 302, 304-05 (1943) (*per curiam*), as must litigation between parties that have ceased to be adverse because they have come under common ownership or control, *e.g., South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U.S. 300, 301-02 (1892); *East Tennessee, Virginia & Georgia Railroad* v. *Southern Telegraph Co.,* 125 U.S. 695, 695-96 (1888); *Cleveland* v. *Chamberlain,* 66 U.S. (1 Black) 419, 425-26 (1861).[11]

The requirement of adverseness assures sound adjudication based on a full presentation of facts and arguments, for it is "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

Genuine adversary interest between the parties functions to focus the issues in suits pressed

> "with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast* v. *Cohen, supra,* 392 U.S. at 96-97.

[11] *Cf. Wood-Paper Co.* v. *Heft,* 75 U.S. (8 Wall.) 333, 336 (1869) (case must be dismissed where patent that is subject of litigation has been transferred from defendant to plaintiff during pendency of suit).

The complete record that only a clash of adverse legal interests can provide also prevents courts from relying on one-sided records that fail to furnish "the fullest disclosure of all material facts" and thereby being "misled into doing grievous wrong to the public." *Chicago & Grand Trunk Railway* v. *Wellman, supra,* 143 U.S. at 346. Accordingly, in the "absence of a genuine adversary issue between the parties . . . a court may not safely proceed to judgment . . . [because] 'honest and actual antagonistic assertion of rights' to be adjudicated [is] a safeguard essential to the integrity of the judicial process." *United States* v. *Johnson, supra,* 319 U.S. at 304-05.

The appropriate inquiry is whether the parties' initial pleadings demonstrate an adverseness of interests sufficient to satisfy the Article III requirement that a case or controversy exists between them. *See Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 (1976); *O'Shea* v. *Littleton, supra,* 414 U.S. at 493; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941). In this case, the requesters' complaint and the CPSC's answer make clear that they both desire precisely the same result, namely, release of the information. The District of Columbia Circuit therefore erred in finding a case or controversy and in remanding the action to the District Court to determine whether under the applicable statutes the requesters are entitled to the information.

The requesters' complaint avers their belief that "[t]he requested documents are subject to mandatory disclosure under the [FOIA]" (A. 19, ¶ 13). The complaint also acknowledges that the CPSC completely agrees that the documents should be disclosed (A. 17-18, ¶ 8):

> "On March 28, 1975, defendant Commission determined, *inter alia,* that the requested documents do not constitute exempt information under the Act, 5 U.S.C. § 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety."

Accordingly, Judge Richey accurately found that "[t]he CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case" (A. 26). As the CPSC stated in its answer to the complaint, "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so" (Dist. Ct. Record No. 11, ¶ 13; *see* A. 28 n.14). The only reason the information has not been released to the requesters is because the CPSC has been enjoined from doing so by the Delaware District Court.

As observed by Judge Richey, the direct consequence of the lack of adverseness between the requesters and the CPSC is "the prospect . . . that both the plaintiff and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA" (A. 26). This prospect—indeed, certainty—can scarcely be depended upon to sharpen the important issues raised by the merits with that "clear concreteness provided . . . from a clash of adversary argument" or to produce a complete record "exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast* v. *Cohen, supra,* 392 U.S. at 96-97.

Nevertheless, in its December 22, 1978 opinion (A. 63-86), the District of Columbia Circuit adhered to the holding of its July 5, 1977 opinion (A. 34-49) that a justiciable case or controversy exists between the requesters and the CPSC (A. 72). In its first opinion the court had attempted to circumvent the congruence of interest between the requesters and the CPSC in two ways, neither of which can withstand scrutiny.[12]

1. The court first perceived a supposed disagreement between the requesters and the CPSC defendants as to whether the orders entered in the Delaware litigation either "preclude" or "absolve" the CPSC from providing the requesters with the information sought (A. 42).[13] But not one word in the requesters' complaint or

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[12] The requesters' theory that, notwithstanding the lack of adverseness between them and the CPSC, the Article III case or controversy requirement may be satisfied by their joining as defendants the manufacturers which do disagree with the requesters' view that the documents should be disclosed is plainly incorrect. (*See, e.g.,* Ct. Appls. First Record Order, No. 4, at 16). The District of Columbia District Court was clearly warranted in holding, first, that the requesters had failed to state a cause of action under the FOIA against the manufacturers (A. 29) and, second, that Fed. R. Civ. P. 19 joinder presupposes the existence of jurisdiction over the cause of action (A. 29-30); absent a case or controversy between the requesters and the CPSC, Rule 19 cannot be used to extend the jurisdiction of federal courts (A. 30). *Letmate* v. *Baltimore & Ohio R.R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970); *Anderson* v. *United States,* 217 F. Supp. 814, 815-16 (E.D. Pa. 1963); *see also Tilley Lamp Co.* v. *Thacker,* 454 F.2d 805, 808 (5th Cir. 1972) (Fed. R. Civ. P. 24 cannot be used to create a "jurisdictional bootstrap" by permitting intervention where there is no primary litigation pending to support intervention). Notably, the District of Columbia Circuit did not disagree with these holdings on appeal.

[13] In its *per curiam* opinion denying applications for rehearing, the District of Columbia Circuit suggested that it had, in its July 5, 1977 opinion, also based its finding of a case or controversy on

briefs ever has questioned the meaning of any of the orders entered in the Delaware litigation or their binding effect on the CPSC. Certainly, there can be no disagreement as to whether the permanent injunction now in effect prevents the CPSC from releasing the accident data to the requesters. *See Delaware Permanent Injunction,* 443 F. Supp. at 1163-64. In its December 22, 1978 opinion the Court of Appeals implicitly recognizes this fact by suggesting to the District of Columbia District Court that it "consider enjoining them [the manufacturers] from enforcing their Delaware judgment against the Commission" (A. 86)."

Thus there can be no serious doubt that the Delaware injunction prohibits the CPSC from releasing the documents. If the requesters have any injury to complain of, it arises, not from the actions of the CPSC, but from the action of the Delaware District Court. Under this Court's reasoning in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), any injury to the requesters resulting from the independent action of the Delaware District Court in issuing the in-

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the CPSC's not releasing the documents even though the Delaware preliminary injunction was, in the court's view, "dead" (A. 59). In that same *per curiam* opinion, however, the court acknowledged that the Delaware preliminary injunction was not "dead" and that it had misunderstood the Delaware "minute order" (A. 55), which had merely "closed out" the case for statistical purposes only.

[14] Also recognizing that there can be no controversy as to the effect of the Delaware injunction is the December 22, 1978 remand order itself (A. 85-86). That order merely directs the District of Columbia District Court to resolve the underlying merits of the case before it, to determine whether the information should be released to the requesters and, in effect, to determine whether the Delaware injunction should have been issued at all (*id.*).

junction (and of the Third Circuit in affirming it) would not create a justiciable case or controversy in this case:

> "The 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.

Where, as here, the named defendant lacks power to provide the relief sought because such power resides in a third party not before the court, there is "not an actual controversy between real parties" and the case thus "lack[s] 'the "exigent adversity" which is an essential condition precedent to federal court adjudication'." *Robinson* v. *Kimbrough,* 558 F.2d 773, 774 (5th Cir. 1977) (*en banc*) (*per curiam*), *quoting Gras* v. *Stevens,* 415 F. Supp. 1148, 1150 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.). *Accord, Merrick* v. *Merrick,* 441 F. Supp. 143, 145-46 (S.D.N.Y. 1977); *Bullock* v. *Edwards,* 403 F. Supp. 913, 917 & n.8 (E.D. La. 1975); *Henrie* v. *Derryberry,* 358 F. Supp. 719, 722 (N.D. Okla. 1973) (three-judge court).[15]

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[15] Thus, for example, it was held in *Robinson* that a complaint alleging the unconstitutionality of a statute authorizing a judge to excuse from jury service a housewife having children 14 years of age or younger must be dismissed because no judge was named as defendant; the only defendants were jury commissioners, who lacked any duty, power, or authority with respect to the statute in question. 558 F.2d at 774. Similarly, it was held in *Gras* that a complaint challenging the constitutionality of a certain provision of the New York divorce law must be dismissed where the defendants, state court justices and the state attorney general and governor, were not empowered to enforce the challenged statute against the plaintiff. 415 F. Supp. at 1151-52. And in *Henrie,* a complaint naming the state attorney general was held not to present a dispute

2. In its first opinion, the District of Columbia Circuit also based its finding of a case or controversy on its perception that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of appellants' [the requesters'] argument that the requested documents should be disclosed" (A. 43 & n.27). Did the Court of Appeals mean to imply by this attack on the *bona fides* of the CPSC's stated position that the Delaware litigation had been the product of some "collusion" between the CPSC and the manufacturers that has escaped the attention of the Chief Judge of the Delaware District Court and a unanimous Third Circuit panel? Most certainly not. The Court of Appeals' charges against the CPSC have no foundation in fact and are totally unjustified.[16] In fact, Judge Latchum, who—unlike the District of Columbia Circuit—was thoroughly immersed in the Delaware litigation, described it as "hotly contested." *Delaware Transfer Denial,* 438 F. Supp. at 210. Clearly, there is nothing in the CPSC's litigation strategy in the Delaware proceedings to support a charge that the CPSC is insincere in its

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between parties having adverse legal interests where it challenged the unconstitutionality of a portion of the Oklahoma abortion statute empowering the state Board of Medical Examiners to revoke or suspend a practitioner's license for conduct contrary to the act but neither the Board nor its members were named as defendants. 358 F. Supp. at 722.

[16] This was made clear to the court in the petitions for rehearing of the July 5, 1977 decision (Ct. Appls. First Record Order, Nos. 13-15 & 17), particularly the petition filed by the CPSC (*id.*, No. 17).

repeatedly expressed desire to release the documents in question.[17]

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[17] Of particular note is the District of Columbia Circuit's completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders ("TROs") and its decision to withdraw its appeal from the preliminary injunction. The need for TROs to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware District Court was certain, and therefore opposition plainly would have been fruitless. Additionally, as noted by the District of Columbia District Court, it was the responsibility of each court entering a TRO in the cases consolidated in Delaware to make an independent determination that a TRO was justified, "and this Court cannot but assume that said responsibility was met" (A. 28). With respect to the decision not to press an interlocutory appeal, the decision to withdraw the CPSC's appeal from the preliminary injunction was not made by the CPSC, but by the Solicitor General, who concluded that the appeal would clearly be futile (Ct. Appls. First Record Order, No. 17, at 12-13). Certainly the District of Columbia Circuit was not also impugning the sincerity of the Solicitor General.

Further, contrary to the District of Columbia Circuit's suggestion, the fact that the CPSC did not press for prompt final hearing in the Delaware litigation does not provide any basis for challenging the *bona fides* of its expressed desire to release the information. Rather, the decision not to press for entry of a final judgment in Delaware stemmed from the CPSC's hope that a favorable decision would be reached in the case of *Pierce & Stevens Chemical Corp.* v. *Consumer Prod. Safety Comm'n,* 439 F. Supp. 247 (W.D.N.Y. 1977) (Ct. Appls. First Record Order, No. 17, at 13-14). In fact, the CPSC's litigation strategy appears completely justified because the Second Circuit reversed entry of a permanent injunction against the CPSC and rendered an opinion favorable to the CPSC's position in the Delaware litigation. *Pierce & Stevens Chemical Corp.* v. *Consumer Prod. Safety Comm'n,* 585 F.2d 1382 (2d Cir. 1978). Earlier, the Second Circuit had affirmed by oral opinion, 578 F.2d 1369 (2d Cir. 1978), the issuance of a preliminary injunction by the district court in *Pierce & Stevens,* again vindicating the Solicitor General's judgment that interlocutory appeal in the Delaware case would have been futile.

A final factor cited by the District of Columbia Circuit to support its attack on the CPSC's sincerity was that it took the CPSC

Inevitably, in its second opinion, the District of Columbia Circuit implicitly retracted its earlier charges against the CPSC, referring to "the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy" (A. 79). Despite this belated retraction, the court reaffirmed without further reasoning its earlier finding of a case or controversy. The plain fact is, however, that neither the vigorous efforts of the CPSC nor those of the *amicus* Consumer Federation of America, both addressing themselves to the merits, have prevented the issuance and affirmance of a permanent injunction which alone is the reason the requesters have not been furnished the information at issue. The Court of Appeals' finding of a case or controversy should not be sanctioned by this Court.

II. INFORMATION IS NOT "IMPROPERLY WITHHELD" WITHIN THE MEANING OF THE FOIA WHEN THE AGENCY DESIRES TO DISCLOSE THAT INFORMATION BUT IS PROHIBITED FROM DOING SO BY A PERMANENT INJUNCTION ENTERED BY A COURT OF COMPETENT JURISDICTION.

In their complaint (A. 15, ¶ 2), the requesters attempted to invoke the subject matter jurisdiction vested in district courts by the FOIA, 5 U.S.C. § 552 (a)(4)(B).[18] That provision states that a district

several months to determine to release the documents to the requesters (A. 43 n.27). Even the requesters, however, recognized that the CPSC needed more time than the rigid FOIA time limits allow in order to review the voluminous documents requested; they themselves agreed to the CPSC's extended timetable (A. 17, ¶ 7). *See* p. 6 n.1 *supra*.

[18] The requesters' complaint referred to the FOIA's jurisdictional grant, which prior to 1974 was contained in 5 U.S.C. § 552 (a)(3) and now appears in 5 U.S.C. § 552(a)(4)(B). The complaint (A. 15, ¶ 2) also purported to invoke jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

The Declaratory Judgment Act only enlarges the range of remedies available in federal courts; it does not extend their subject matter jurisdiction and is, therefore, not an independent basis for jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is the APA an independent grant of subject matter jurisdiction. Jurisdiction to review agency action must be based on 28 U.S.C. § 1331 (1976). *Califano* v. *Sanders*, 430 U.S. 99 (1977). If jurisdiction of a suit brought to compel the release of documents under the FOIA were for some reason premised on § 1331 rather than on the specific jurisdictional grant provided by the FOIA, 5 U.S.C. § 552(a)(4)(B), the question whether documents are "improperly withheld" under the FOIA would nevertheless be dispositive since the standard of review would be whether the agency withholding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706 (2)(A) (1976). *See Chrysler Corp.* v. *Brown*, —— U.S. ——, ——, 99 S. Ct. 1705, 1725-26 (1979). Accordingly, the manufacturers address their argument solely to the dispositive issue, namely, the proper construction of the FOIA.

court "has jurisdiction . . . to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B). Here, the requesters' complaint fails to state a claim upon which relief can be granted because the information at issue has not been "improperly withheld" within the meaning of that subsection.

As the complaint and the CPSC's answer make clear,[19] it is solely because of the Delaware orders and permanent injunction—now affirmed by the Third Circuit—that the CPSC has been unable to release these documents to the requesters. Accordingly, the "with-

[19] Complaint ¶ 8 (A. 17-18, ¶ 8); CPSC answer ¶ 13 (Dist. Ct. Record No. 11, ¶ 13). *See* discussion p. 24 *supra*.

holding" of the documents, far from being "improper," was mandated by law. In ordering the District Court to determine whether the information should be disclosed, the District of Columbia Circuit did not address and thus implicitly rejected this argument raised below[20] and twice endorsed by the Solicitor General in this Court.[21] This, we submit, was error.

On its face, the statutory term "improperly withheld" would not include information withheld by an agency because of an order of a court of competent jurisdiction enjoining that agency from disclosing that information. There is no statutory basis in the FOIA for concluding that the term should be given other than its plain meaning; nor is there any basis in equity for reaching a different conclusion.

A. Neither the FOIA Itself nor Any Legislative History Suggests that Documents Are Improperly Withheld when the Agency Has Been Permanently Enjoined from Releasing Them.

Neither 5 U.S.C. § 552(a)(4)(B) nor any other provision of the FOIA provides any basis for concluding that the statute contemplates that a judicial decree permanently enjoining disclosure of requested records by an agency can be parlayed into a claim of improper withholding.[22] It defies all reality to believe that the

[20] *See, e.g.*, Ct. Appls. First Record Order, No. 23, at 10-11.

[21] Brief for Fed. Respondents in Opposition, at 6-7, No. 78-1248; Brief for Fed. Respondents in Opposition, at 5, No. 77-508.

[22] *Cf. Linker* v. *Hills*, 453 F. Supp. 556, 561 (S.D.N.Y. 1978) (nonproduction of missing agency documents is not an "improper withholding" under FOIA); *accord, Nolen* v. *Rumsfeld*, 535 F.2d 890 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Weisberg* v. *Department of Justice*, 438 F. Supp. 492 (D.D.C. 1977); *Exxon Corp.* v. *FTC*, 384 F. Supp. 755 (D.D.C. 1974).

court hearing a FOIA complaint would be allowed, let alone expected, to disregard a final decree of another court barring disclosure of the same requested records by the same agency.

While the statute by its terms does not provide for what are popularly called "reverse-FOIA" suits, both this Court and the District of Columbia Circuit have recognized not only that such suits will lie under the Administrative Procedure Act but also that they are wholly within keeping of the legislative scheme embodied in the FOIA. *See Chrysler Corp.* v. *Brown*, —— U.S. ——, ——, 99 S. Ct. 1705, 1713-14, 1725-26 (1979); *Charles River Park "A," Inc.* v. *Department of Housing and Urban Development*, 519 F.2d 935, 941, 942 (D.C. Cir. 1975). The recognition of the right to bring a reverse-FOIA suit carries with it a concomitant acknowledgement that the suit may succeed and the agency may be enjoined from release of documents. It cannot be believed that on the one hand the FOIA does not bar the right to bring such suits and yet, on the other hand, the same FOIA effectively negates that right by dictating that resulting decrees requiring withholding be ignored.

The decision of the District of Columbia Circuit would require an interpretation of the FOIA which would either eliminate the authority of the federal courts to enjoin the release of information or would permit courts to direct agencies to disregard any injunction which issued in other proceedings. If such a distortion of normal equity powers had been contemplated by 5 U.S.C. § 552(a)(4)(B), one would be entitled to expect that Congress "would have made its desire plain." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944). *See Robertson* v. *Railroad Labor Board*, 268

U.S. 619, 627 (1925); *In re East River Co.*, 266 U.S. 355, 367 (1924); *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375, 384 (1924).

The legislative history of the FOIA in no way suggests that the statute mandates agency violation of a court order forbidding release so as to avoid a charge of improper withholding. To the contrary, the legislative history shows that the statute was designed as a corrective measure directed—not against the courts—but rather against agency abuses of former section 3 of the APA (5 U.S.C. § 1002), which had been "used more as an excuse for withholding than as a disclosure statute" by government officials reluctant to disclose agency records. S. Rep. No. 813, 89th Cong., 1st Sess. 3, 5 (1965) ("S. Rep. No. 813"); *see* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2418, 2422 ("H.R. Rep. No. 1497").[23] Accordingly, the FOIA was intended "to loosen the agency's grip on the data underlying governmental decisionmaking." *Chrysler Corp.* v. *Brown*, *supra*, —— U.S. at ——, 99 S. Ct. at 1712 n.10. To this end, the federal courts were made the final arbiters of what documents agencies need to disclose under the Act. *See* S. Rep. No. 813, *supra*, at 6; 112 Cong. Rec. 13642 (1966) (remarks of Rep. Moss, House sponsor of the FOIA).

[23] Indeed, agencies had cited § 3 of the APA "as statutory authority for the withholding of virtually any piece of information that an official or an agency [did] not wish to disclose," S. Rep. No. 813, *supra*, at 5, and "case after case of improper withholding based on 5 U.S.C. 1002 [§ 3 of the APA] ha[d] been documented" by Congress, H.R. Rep. No. 1497, *supra*, at 5, *reprinted in* [1966] U.S. Code Cong. & Ad. News, *supra*, at 2422.

The committee reports dealing with the jurisdictional grant to the district courts to enjoin "improper withholding" are entirely consistent with the conclusions drawn here that the FOIA erects no impediment to the judiciary's ability to accommodate to an outstanding decree of a coordinate court. Thus the House Report, in pertinent part, states:

> "The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H.R. Rep. No. 1497, *supra*, at 9, *reprinted in* [1966] U.S. Code Cong. & Ad. News, *supra*, at 2426.

Likewise the Senate Report on this subsection focuses on removal of roadblocks to disclosure wrongfully set up by agencies:

> "Subsection (c) [of Pub. L. No. 89-487, § 3, 80 Stat. 250, now codified as 5 U.S.C. § 552(a)(4)(B)] contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel." S. Rep. No. 813, *supra*, at 8.

Finally, in clarifying Congress' original intent in providing judicial review for improper agency withholding, the Senate Report accompanying the 1974 amendments to the FOIA emphasized "that de novo judicial review is available to challenge agency withholding under any provision in section 552"—*not* withholding pursuant to a permanent injunction. S. Rep. No. 93-854, 93d Cong., 2d Sess. 9 (1974).

The sum and substance is that there is no basis in the FOIA itself or in its legislative history for riding

roughshod over a permanent injunction forbidding disclosure of agency records.

B. The FOIA Does Not Set Aside General Equitable Principles Which Provide Sufficient Flexibility To Enable a District Court Exercising Jurisdiction under 5 U.S.C. § 552(a)(4)(B) To Respect a Permanent Injunction of a Coordinate Federal Court.

In addition to the flexibility afforded by the FOIA itself, a court hearing a FOIA action retains its inherent equitable discretion. In *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974), the Court stated:

> "With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." [24]

[24] The manufacturers wish to make clear that there is no need whatsoever for them to rely on the view of some of the lower federal courts that courts may exercise broad equitable discretion under the FOIA to create new substantive exemptions to mandatory disclosure on the basis of a simple balancing of interests. *See Gen. Servs. Adm'n* v. *Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Consumers Union of the United States, Inc.* v. *Veterans Adm'n*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). *But see Halperin* v. *Department of State*, 565 F.2d 699, 706-707 (D.C. Cir. 1977) and *Soucie* v. *David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (district courts may exercise limited discretion under the FOIA only under exceptional circumstances such as great danger to the national interest). The equitable discretion argument discussed above is limited to the narrow and extraordinary circumstances presented by this case. 1 K. Davis, *Administrative Law Treatise* § 5:25, at 378-79 (2d ed. 1978) (since 5 U.S.C. § 552(a)(4)(B) of the FOIA is not a mandatory provision for judicial enforcement, courts retain discretion to exercise FOIA jurisdiction in a manner avoiding clearly inequitable results).

See Hecht Co. v. *Bowles*, 321 U.S. 321, 329 (1944) (a "grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances" (emphasis by the Court)); *accord, Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975) (district courts retain discretion under Williams Act, 15 U.S.C. § 78m(d) (1970), to refuse to enjoin technical violation where Act's purpose and object would not be served by an injunction).[25]

As explained in *Hecht Co.* v. *Bowles, supra*, 321 U.S. at 329:

> "Flexibility rather than rigidity has distinguished [equity jurisdiction]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The distinctive flexibility of equity jurisdiction retained under 5 U.S.C. § 552(a)(4)(B) enables a court to preserve the integrity of judicial orders by respecting a permanent injunction of a coordinate federal court barring disclosure of the very information sought. Such an exercise of equitable discretion would in no way impair a court's ability to give full effect to the mandatory disclosure provisions of the FOIA. In these narrow and extraordinary circumstances, it would serve only to avoid clearly inequitable results.

In short, since there can be no "improper withholding" in the face of a permanent injunction forbidding disclosure, and since an equity court asserting juris-

[25] As stated by the Court in *Rondeau*: "The short of the matter is that none of the evils to which the Williams Act was directed has occurred or is threatened in this case." 422 U.S. at 59.

diction under the FOIA has sufficient flexibility to take that injunction into account, the Court of Appeals erred in reversing the dismissal of the complaint.

III. ESTABLISHED PRINCIPLES OF COMITY AND FINALITY OF JUDGMENTS MANDATE THAT THE REQUESTERS' ACTION NOT PROCEED.

Notwithstanding the entry of the Delaware injunction barring disclosure of the information being sought and thus the lack of a case or controversy or a statutory basis for the action, the District of Columbia Circuit determined that the District Court should proceed to the merits of the requesters' FOIA complaint. This holding runs directly counter to established principles of comity and the finality to be accorded judgments of coordinate federal courts.

The District of Columbia Circuit based its decision on its view that FOIA requesters should never be bound by an order enjoining the government from releasing certain information unless they were parties to the case in which the order was entered. This holding ignores the fact that the government is bound by the order and, if allowed to stand, will render meaningless reverse-FOIA actions because of the impossibility of joining all actual and potential FOIA requesters in such actions.

We shall demonstrate below that the court made a fundamental error in construing the FOIA as giving requesters of information rights outweighing those of submitters of information under statutes such as Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), and 28 U.S.C. § 1391(e). Moreover, the court's decision, far from being required by existing law, ignores numerous cases holding that non-parties such as the

requesters here may be bound by the results of proceedings in which their position was presented to the court, especially when they chose not to participate and the proceedings were in the nature of judicial review of an administrative determination.

A. The District of Columbia Circuit Wrongfully Elevated the Rights of the Requesters Over Those of the Manufacturers by Ignoring the Policies Expressed in Section 6(b)(1) of the Consumer Product Safety Act Prohibiting Disclosure and the Applicable Venue Provision, 28 U.S.C. § 1391(e).

Underlying the District of Columbia Circuit's decision is its perception that, since the District of Columbia is "the venue authorized by the FOIA" (A. 65), a requester's forum choice of the District of Columbia should outweigh the forum choice made by the submitter of information pursuant to 28 U.S.C. § 1391(e) (1976), even in the face of a permanent injunction barring release of the information entered in the submitter's chosen forum (A. 82-83).[26] In so holding, the court misconstrued the objectives of the venue provisions involved and totally ignored the significant rights afforded submitters of information by non-disclosure statutes such as Section 6(b)(1) of the CPSA.

A review of the legislative history of the 1974 amendments to the FOIA reveals that the District of Columbia Circuit completely failed to understand the reason for the addition of the District of Columbia as a forum choice for FOIA litigation. *See* Pub. L. No. 93-502, § 1, 88 Stat. 1561 (1974), amending 5 U.S.C. § 552(a). The

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[26] Of course, the requesters could have suggested to Judge Latchum the possibility of transfer of the Delaware litigation to the District of Columbia. Since they did not do so, they should not be permitted to raise the venue issue now.

Senate report accompanying the amendments makes clear that this action was taken because "defense of litigation in the District of Columbia would be more convenient from the *government's* vantage point." S. Rep. No. 93-854, 93d Cong., 2d Sess. 12-13 (1974) (emphasis added). The District of Columbia was considered an appropriate additional forum because it is the seat of government and the government's attorneys are there. *Id.* at 13. Thus, contrary to the Court of Appeals' interpretation, there is no indication that Congress was concerned with the convenience of the requester (who already could sue where he resided or had his principal place of business or where the agency records were located) or in providing him with a so-called "sympathetic" forum (*see* A. 84) when it added the District of Columbia as a forum choice for FOIA actions.

In sharp contrast to the FOIA venue provision's inclusion of the District of Columbia as a convenient forum for the government defendant, 28 U.S.C. § 1391 (e) gives the submitter of information to the government suing to protect the confidentiality of the information a broad choice of venue, including the right to bring suit in his "home court." The District of Columbia Circuit's undue concern for the interests of FOIA requesters and its desire to intrude into the Delaware proceedings caused it completely to ignore the significant policy of this statutory provision.

Prior to 1962, an action against an agency official normally could only be brought in the District of Columbia—the precise result sought now by the requesters. This restriction placed a "considerable burden" on the plaintiff living in another part of the country, who incurred "great expense and inconvenience [in] conducting litigation far from [his] home." Cates, *Venue*

in Corporate Suits Against Federal Agencies and Officers, 60 Minn. L. Rev. 81, 85 (1975); *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 923 (1957).

In order to remedy this unfairness, in 1962 Congress amended the general federal venue statute by adding what is now subsection (e) permitting citizens to sue the government locally. *See* Pub. L. No. 87-748, § 2, 76 Stat. 744 (1962). The legislative history of this landmark amendment demonstrates that Congress was concerned with broadening the plaintiff's choice of venue in actions brought to review administrative action and viewed the then current state of the law to be "contrary to the sound and equitable administration of justice." S. Rep. No. 1992, 87th Cong., 2d Sess. 1, 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News 2784, 2785, 2786.[27]

The manufacturers should not be penalized for proceeding against the CPSC in the forum authorized by the 1962 amendment which was so clearly intended for their benefit. As this Court recently held, a person aggrieved by the government's determination to disclose

[27] The legislative history of the predecessor bills to Public Law No. 87-748 clearly reveals the importance that Congress attached to this amendment to the general venue provision and the Congressional intent to facilitate the availability of "judicial remedies for the citizen who is aggrieved by the workings of Government." *See* H.R. Rep. No. 1936, 86th Cong., 2d Sess. 3 (1960); *see generally* Proposed Amendments Relating to Venue in Actions Against the United States, Its Officers or Agencies: Hearings on H.R. 10089 before Subcomm. No. 4 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. (1960). As summarized before Congress by Judge Albert B. Maris, Senior Circuit Judge for the United States Court of Appeals for the Third Circuit, "We [judges] think that this is a good bill, that it would help in the administration of justice, would relieve congestion in the [District of Columbia] Courts, and would be fair to litigants." *Id.* at 25.

information may seek judicial review of that determination pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706. *Chrysler Corp.* v. *Brown,* —— U.S. ——, ——, 99 S. Ct. 1705, 1725-26 (1979). Nowhere in *Chrysler* is there any indication that a requester's rights under the FOIA should supersede those of the submitter of the information who is resisting disclosure pursuant to some other statute such as Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1). Indeed, the Court explicitly held in *Chrysler* that any disclosure which would violate a statute (in that case, 18 U.S.C. § 1905) would be enjoinable as "not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A). —— U.S. at ——, 99 S. Ct. at 1726.

Here Judge Latchum held that release of the information at issue would violate the CPSC's own enabling statute and the Third Circuit affirmed his permanent injunction, holding that "[n]o lesser measure of relief would serve to protect the interests at stake and vindicate [the manufacturer's legal rights]." *Third Circuit Affirmance,* 598 F.2d at 816. Plainly, the manufacturers' interests cannot be considered less significant than those of the requesters, and the District of Columbia Circuit erred in failing to accord to submitters of information the full measure of their rights under 28 U.S.C. § 1391(e) and this Court's decision in *Chrysler.*

B. The Court of Appeals' Direction to the District Court To Proceed to the Merits of the Requesters' Action and Consider Enjoining the Manufacturers from Enforcing the Delaware Injunction Does Violence to Principles of Comity and the Orderly Administration of Justice.

As the requesters' complaint itself indicates (A. 19, ¶ 11), it was the entry of temporary restraining orders

in the Delaware litigation prohibiting release *pendente lite* of the information submitted by the manufacturers to the CPSC that gave rise to the requesters' suit, since otherwise the CPSC would have released the information to them (Dist. Ct. Record No. 11, ¶ 13; *see* A. 28 n.14). Thus, as noted by the District of Columbia District Court (A. 28-29), from the start the requesters' suit was merely an attempt to countermand the orders entered in the Delaware litigation. The Court of Appeals' direction to the District Court to proceed to the merits of the requesters' case and to consider enjoining the manufacturers from enforcing the Delaware injunction against the CPSC therefore ran directly counter to long-established principles of comity and the orderly administration of justice.[28]

The doctrine of comity requires that one court refrain from duplicating or interfering with the proceedings of another court with prior jurisdiction over the subject matter. "The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results." *Great Northern Railway* v. *National Railroad Adjustment Board,* 422 F.2d 1187, 1193 (7th Cir. 1970). Notions of judicial efficiency and the deference due other courts both militate against duplicative litigation and thus the second case should not proceed. *See Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976).

As noted by the Solicitor General, if the requesters' suit is permitted to proceed, only two results are pos-

[28] Significantly, the Solicitor General has twice stated before this Court his agreement with the manufacturers on this point. *See* Brief for Fed. Respondents in Opposition, at 7-8, No. 78-1248; Brief for Fed. Respondents in Opposition, at 6, No. 77-508.

sible. *See* Brief for the Federal Respondents in Opposition, at 8. The District of Columbia courts may agree with the Delaware District Court and the Third Circuit that the documents need not be disclosed, in which event valuable judicial time will have been wasted in duplicative proceedings. *See Colorado River Water Conservation District* v. *United States, supra,* 424 U.S. at 817. Alternatively, they could order that the documents be disclosed, thus creating a direct conflict with the orders entered and approved by their sister courts. While the second result is the one desired by the requesters, neither would be proper.

This Court has long recognized that principles of comity are particularly applicable where two federal courts are involved. *See Covell* v. *Heyman,* 111 U.S. 176, 182 (1884). Moreover, such principles are especially important where, as here, declaratory and injunctive relief are involved, since such relief "is best administered by one court . . . the one in which the relief was first sought." *ACLU* v. *Laird,* 463 F.2d 499, 501 (7th Cir. 1972) (Stevens, J.), *cert. denied,* 409 U.S. 1116 (1973). As the United States Court of Appeals for the Ninth Circuit held in *Lapin* v. *Shulton, Inc.,* 333 F.2d 169, 172 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964):

> "[F]or a nonissuing court to entertain an action for such relief [from an injunction] would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court (as discussed in Deposit Bank v. Frankfort [191 U.S. 499, 512 (1903)] and System Federation v. Wright [364 U.S. 642, 647 (1961)]) to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

> ". . . [C]onsiderations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there."

Accord, Mann Manufacturing, Inc. v. *Hortex, Inc.,* 439 F.2d 403, 408 (5th Cir. 1971).

Similar reasoning has led federal district courts to refuse to hear actions seeking to enjoin the enforcement of consent decrees fashioned by other courts. *See St. Louis Amusement Co.* v. *Paramount Pictures, Inc.,* 61 F. Supp. 854, 857 (E.D. Mo.), *appeal dismissed per curiam,* 326 U.S. 680 (1945), *aff'd on other grounds,* 168 F.2d 988 (8th Cir. 1948); *Torquay Corp.* v. *Radio Corp. of America,* 2 F. Supp. 841, 844 (S.D.N.Y. 1932). Such actions are analogous to the requesters' FOIA action, which seeks to have the District of Columbia Court order the CPSC to do precisely what the Delaware court has already enjoined it from doing—release the information in question to the requesters. Surely a permanent injunction entered after extended litigation should not be accorded any less deference than a consent decree.

The facts of this case are strikingly similar to those in *Gregory-Portland Independent School District* v. *Texas Education Agency,* 576 F.2d 81 (5th Cir. 1978), *cert. denied,* —— U.S. ——, 99 S. Ct. 1423 (1979), where the United States had obtained an injunction ordering the Texas Education Agency (TEA), *inter alia,* to refuse to fund and accredit those Texas school districts still discriminating on the basis of race. Upon being informed by TEA that its racial makeup was in violation of the order, Gregory-Portland, which had

not been a party to the earlier litigation, filed its own action against the TEA in a different district and obtained a declaratory judgment that it had not discriminated and an order permanently enjoining the TEA from suspending its accreditation or receipt of funding. On appeal the Fifth Circuit held that "because the injunction against TEA interfered with the integrity of the order from the Eastern District, the Southern District Court should have declined jurisdiction." 576 F.2d at 83. The same result should obtain here.

Despite these established principles, the District of Columbia Circuit refused to accord any deference to the proceedings in Delaware and the Third Circuit. None of the grounds advanced by the court for this refusal can withstand analysis.

First, the District of Columbia Circuit held that comity only applies in situations "in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter" (A. 77). Quite to the contrary, it is well established that principles of comity apply even where the plaintiff in the second federal suit was not a party to the first suit. *See, e.g., Gregory-Portland Independent School District* v. *Texas Education Agency, supra,* 576 F.2d at 82; *United States* v. *Citizens National Trust & Savings Bank,* 166 F. Supp. 410, 412 (S.D. Cal. 1958), *aff'd,* 270 F.2d 128 (9th Cir. 1959); *St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 855; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844. Indeed, in *Gregory-Portland,* the plaintiff in the second suit had entirely different interests from the TEA, the main defendant in the original suit. If comity was applicable in *Gregory-*

Portland, it should clearly apply here, where the two litigations involve precisely the same subject matter and raise precisely the same issues, and where the requesters and the CPSC both favor disclosure of the information to the requesters.[29]

Second, the District of Columbia Circuit defined comity in such a way as to suggest that the doctrine should apply only where actions are simultaneously pending in two different courts, not where the first court has come to final judgment (*see* A. 76-77). However, there is no reason for a federal court to accord a final order of another federal court in the same factual dispute any less deference than the existence of on-going proceedings in that court. If anything, it might be expected that the rule would be to the contrary:

> "It is inconceivable that one [federal district court] judge should attempt to nullify the conclusion of his brother already finally reached and formally entered in a case properly before him. Such an act on the part of a dissenting judge or of a different court not in the line of established appellate process, would seem to be an arrogant assumption of superiority not to be tolerated." *Land* v. *Dollar,* 190 F.2d 366, 380 (D.C. Cir. 1951), *cert. dismissed,* 344 U.S. 806 (1952).

Accord, United States v. *Citizens National Trust & Savings Bank, supra,* 166 F. Supp. at 412.[30]

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[29] These facts also distinguish the instant case from the only two authorities cited by the Court of Appeals in support of its position (*see* A. 78 n.47). *See Great Northern Ry.* v. *Nat'l R.R. Adjustment Bd.,* 422 F.2d 1187, 1193-94 (7th Cir. 1970); *Robertson* v. *Department of Defense,* 402 F. Supp. 1342, 1346 (D.D.C. 1975).

[30] The Court of Appeals' brushing aside of *stare decisis* as a ground for deferring to the Delaware litigation (*see* A. 73) ig-

Indeed, Article VI, Section 1 of the Constitution as implemented by 28 U.S.C. § 1738 requires a federal court in one forum to give the same full faith and credit to the judgment of a federal court in another jurisdiction as it would be required to give the judgment of a state court in that jurisdiction. *See Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82, 85 (3d Cir. 1941); *see also Semler* v. *Psychiatric Institute, Inc.*, 575 F.2d 922, 928 (D.C. Cir. 1978). Additionally, deference to another federal court's judgment is required because

> "the matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as the head of the judicial system of the United States would compel it to do so because 'they are many members yet but one body.'" *Caterpillar Tractor Co.* v. *International Harvester Co., supra,* 120 F.2d at 86.

See Vestal, *The Constitution and Preclusion/Res Judicata,* 62 Mich. L. Rev. 33, 37-38 (1953).

Thus it should not be surprising that the doctrine of comity has been held to apply to final orders as well as to on-going proceedings. *See Gregory-Portland Independent School District* v. *Texas Education Agency, supra,* 576 F.2d at 82; *St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 855; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844. Any contrary result would encourage

nores the principle articulated in *Land* and *Citizens National Trust* that such deference is necessary where the two litigations involve the very same factual controversy.

collateral attacks on judgments and "render the concept of final judgments meaningless." *Prate* v. *Freedman,* 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd,* 573 F.2d 1294 (2d Cir. 1977), *cert. denied,* 436 U.S. 922 (1978); *see Velsicol Chemical Corp.* v. *Monsanto Co.,* 579 F.2d 1038, 1050 (7th Cir. 1978).

Indeed, the District of Columbia Circuit itself has shown great deference to final decisions of other courts, stating, for example, in *Hilton Hotels Corp.* v. *Weaver,* 325 F.2d 1010 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 951 (1964), that it "should not attempt to reexamine the matters considered and resolved by the Third Circuit, a court having authority equal to our own" (footnote omitted).[31] In contrast to its decision in *Hilton Hotels,* here the Court of Appeals not only directed the District Court to redetermine issues already decided by the Delaware Court, but went so far as to suggest that the District Court consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC.[32] This suggestion further demon-

[31] More recently, the District of Columbia Circuit held that the District Court "should have paid . . . heed" to principles of comity and stayed an FTC subpoena enforcement action during the pendency of proceedings in a pre-enforcement action brought by the subpoenaed party in New Jersey. *FTC* v. *Wearly,* No. 78-1586, slip op. at 4 (D.C. Cir. May 9, 1979), *cited in* [1979] Antitrust & Trade Reg. Rep. (BNA) No. 916, at A-14 (May 31, 1979).

[32] In appropriate circumstances a court first acquiring jurisdiction may enjoin a party before it from prosecuting a later action. However, we have found no support for the District of Columbia Circuit's suggestion that a second court may enjoin a party from enforcing a *judgment* obtained in an earlier action. Indeed, such action would be unwarranted in light of the authorities cited above. The only case cited by the Court of Appeals (*see* A. 86) supports the former and not the latter proposition. *See Steelman* v. *All Continent Corp.,* 301 U.S. 278 (1937), where the first court

strates that the integrity of the Delaware injunction will be severely undermined if the decision below is permitted to stand.

Finally, the Court of Appeals intimated that whatever rationale lies behind comity, the doctrine may not be used to preclude relitigation and should only result in a stay and not the dismissal of a later filed action (*see* A. 77).[33] This simply is not so. Courts have not hesitated to dismiss actions on grounds of comity. *See, e.g., ACLU* v. *Laird, supra,* 463 F.2d at 500; *Lapin* v. *Shulton, Inc., supra,* 333 F.2d at 172; *see also Mann Manufacturing, Inc.* v. *Hortex, Inc., supra,* 439 F.2d at 407-08. Dismissal has resulted even where the plaintiff was not a party to the first action. *See, e.g., St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 857; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844; *see also*

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acquiring jurisdiction in a bankruptcy matter enjoined a party before it from *attempting* to obtain a judgment in a later filed action.

Moreover, even assuming that the Court of Appeals' suggestion could be carried out, the CPSC would still face the risk of a contempt citation issued by Judge Latchum *sua sponte* if it violated his injunction. *See Fletcher* v. *United States,* 174 F.2d 373, 376 (4th Cir.), *cert. denied,* 338 U.S. 851 (1949). At a hearing held immediately after the District of Columbia Circuit issued its first opinion, Judge Latchum explicitly noted that, contrary to the Court of Appeals' understanding, the preliminary injunction he had entered remained in full force and effect and could be enforced by contempt (Ct. Appls. Amending Record Order, Nos. 3 & 8, Exhibit D at 5).

[33] In fact, a stay pending the termination of the Delaware litigation would be of indefinite duration because of the continuing nature of the injunctive relief granted by Judge Latchum and affirmed by the Third Circuit.

Gregory-Portland Independent School District v. *Texas Education Agency, supra,* 576 F.2d at 82.[34]

The District of Columbia Circuit itself affirmed the dismissal of a second action on grounds of comity in *Hilton Hotels Corp.* v. *Weaver, supra,* stating:

> "[W]here a prior decision against the plaintiff on the same issues he raises in the instant case would necessarily be frustrated or obstructed by a present decision in the plaintiff's favor this court will not interfere with a prior decision adverse to the plaintiff." 325 F.2d at 1010 n.1.

Similar reasoning has led courts to transfer actions to other courts where prior litigation on the same subject has taken place, especially where injunctive relief has been involved, because to grant the relief sought "[might] well abrogate the efficacy of the [first court's] injunction and thereby seriously interfere with that court's power to supervise its own continuing decree" and "would be highly injudicious." *Knopf* v. *Colby,* No. 73-4626, slip op. at 16-17 (S.D.N.Y. Nov. 12, 1973); *see Brotherhood of Locomotive Firemen & Enginemen* v. *Central of Georgia Railway,* 411 F.2d 320, 326 (5th Cir. 1969); *see also Jahncke Service, Inc.* v. *OKC Corp.,* 301 F. Supp. 866, 869 (D. Del. 1969); *Randall* v. *Jenkins,* 271 F. Supp. 904, 905 (E.D. Pa. 1967). These cases, taken in conjunction with authorities cited previously, demonstrate that principles of comity require that the requesters' action be transferred to Dela-

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[34] For a more detailed argument as to why the requesters may be precluded from proceeding in the District of Columbia, *see* pp. 52-62 *infra.*

ware if that is possible or else dismissed [35] and that the requesters be relegated to pursuing relief on "whatever remains" of their claims before the Delaware Court. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Central of Georgia Railway, supra,* 411 F.2d at 324.

C. The Requesters Should Be Precluded from Relitigating in the District of Columbia Matters Already Thoroughly Litigated and Finally Determined in Delaware.

While not dispositive of the issues presented by this case, recent decisions of this Court have illustrated the propriety of precluding relitigation of matters already finally determined. *See, e.g., Montana* v. *United States,* —— U.S. ——, ——, 99 S. Ct. 970, 973-74 (1979); *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, ——, 99 S. Ct. 645, 651-52 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 328-29 (1971). Two reasons militate in favor of such preclusion here: (1) the knowing failure of the requesters to take part in the Delaware litigation and (2) the active representation of their interests in the outcome of that litigation by both the CPSC and Consumer Federation of America.

[35] Here dismissal would serve the same end as would transfer, since the Delaware Court has continuing jurisdiction over the manufacturers' actions and the requesters could at any time present their claims to that court, which has specifically stated its willingness to entertain a motion to amend its injunction should this be warranted. Order Denying Defendants' Motion to Alter or Amend Judgment, *GTE Sylvania, Inc.* v. *Consumer Prod. Safety Comm'n,* No. 75-104 (D. Del. Dec. 22, 1977); *see Lapin* v. *Shulton, Inc., supra,* 333 F.2d at 172; *Torquay* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844.

1. The requesters should be bound because they deliberately bypassed ample opportunities to participate in the Delaware litigation.

The need for complete, consistent, and efficient settlement of controversies strongly favors the preclusive effect of a final judgment against persons who knew of the litigation but "purposely bypassed an adequate opportunity to intervene." *See Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114 (1968).[36] Accordingly,

> "the law is developing a critical eye towards persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it." *Western Shoshone Legal Defense & Education Association* v. *United States,* 531 F.2d 495, 502 (Ct. Cl.), *cert. denied,* 429 U.S. 885 (1976).

Thus, for example, in *Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486, 505-06 (1968), this Court held that challengers of an ICC order whose actions were stayed in deference to similar proceedings in which they failed to participate were precluded from relitigating issues decided in those proceedings. There are a number of lower court cases to similar effect. *See, e.g., Cummins Diesel Michigan, Inc.* v. *The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel,* 459 F. Supp. 507, 513-16 (S.D. Fla. 1978); *Prate* v. *Freedman, supra,* 430 F. Supp. at 1374.

[36] Contrary to the District of Columbia Circuit's suggestion (*see* A. 82-83), due process requires only that persons have an *opportunity* to be heard. *See Montana* v. *United States,* —— U.S. ——, ——, 99 S. Ct. 970, 974 (1979); *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971).

While the policies underlying these authorities support the general proposition that FOIA requesters with knowledge of reverse-FOIA proceedings will be bound by the results of those proceedings if they had an opportunity to intervene, this case does not require the pronouncement of a general rule because of the particularly compelling facts involved here. These requesters are sophisticated litigation-oriented consumer groups. They were aware of the litigation in nearby Delaware almost from the time of its inception, explicitly referring to it in their complaint (A. 18, ¶ 10). They received numerous direct invitations to participate in the litigation from both the parties and the courts.[37] However, for strategic reasons they chose not to travel the short distance to Wilmington to accept any of these invitations, but instead pursued their own FOIA action in the District of Columbia. *See Third Circuit Affirmance,* 598 F.2d at 799.[38] It was not until after the CPSC had appealed from the entry of the

[37] In dismissing their action, the District of Columbia District Court reminded the requesters of the possibility of intervention in the Delaware litigation (A. 31). Similarly, in denying the CPSC's motion to transfer the Delaware action to the District of Columbia, the Delaware District Court noted the requesters' claimed dissatisfaction with the CPSC's representation of their interests and specifically invited them to intervene. *See Delaware Transfer Denial,* 438 F. Supp. at 212. Additionally, the manufacturers repeatedly have pointed out to the requesters the possibility of intervention, inviting such participation on the merits by the requesters as recently as the appeal in the Third Circuit. *See* pp. 8-9 & n.3 *supra.*

[38] The requesters' refusal to participate in the Delaware litigation based on any claim of hardship could not be substantiated in light of the fact that one of the requesters has sought to intervene in another action pending in the District of Delaware. *See* Motion for Leave To Intervene as Defendants by Consumers Union of the United States, Inc., filed Sept. 23, 1977, *Pharmaceutical Mfrs. Ass'n* v. *FDA,* No. 77-291 (D. Del.). Moreover, the requesters themselves conceded in the District of Columbia Circuit that the inconvenience of the Delaware forum here "may be minimal" (Ct. Appls. First Record Order, No. 4, at 18).

permanent injunction in Delaware that the requesters, in a belated attempt to nullify the Delaware proceedings, finally filed a brief as *amici curiae* with the Third Circuit for the limited purpose of urging that the Delaware injunction be vacated because they had not been parties before the lower court[39]—a point they never raised before Judge Latchum, whether by letter, participation as *amici,* or limited intervention.

[39] Incidentally, in an attempt to "accommodat[e]" FOIA and reverse-FOIA suits (A. 78), the District of Columbia Circuit stated, by way of dictum, that the requesters were indispensable parties under Rule 19(b) to the Delaware proceedings and that the failure to join them mandated dismissal of the Delaware actions (A. 80-81). We know of no reverse-FOIA case (including *Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979)) where the requester has been joined as a party, much less where a court has held that a requester must be joined under Rule 19. The consequences of such a holding could be profound. First, every reverse-FOIA case in which a judgment has been entered for the submitter without intervention of the requester would be subject to collateral attack. Second, where two requesters reside in different districts, the submitter would be denied a forum or, at the very least, would be forced to bring two lawsuits in order to obtain personal jurisdiction over each requester.

The District of Columbia Circuit's gratuitous comments concerning Rule 19 were made without the benefit of full briefing or argument and are without legal foundation. *See Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 300 (1902). Rather, the Rule 19 discussion appears to have been calculated to influence the decision of the Third Circuit, where the issue had been fully briefed and was about to be argued. In any event, as the Third Circuit itself held, any claim that the requesters' interests under the FOIA were prejudiced by the Delaware proceedings must be rejected because they deliberately refused to intervene even thought they could have done so "without significant burden." *See Third Circuit Affirmance,* 598 F.2d at 799.

Thus, as in *Land* v. *Dollar,* 190 F.2d 366, 375 (D.C. Cir. 1951), *cert. dismissed,* 344 U.S. 806 (1952), this case is merely an attempt to relitigate what has already been decided. Having chosen not to become involved in the Delaware proceedings at the time when their participation would have been most meaningful, the requesters should not now be allowed to undermine the result of those proceedings.

2. The requesters should be bound because their interests in the outcome of the Delaware litigation were adequately represented by the CPSC throughout and also on appeal by Consumer Federation of America.

Non-parties may properly be bound by the result of a litigation if their interests are represented by another who was a party.[40] Such preclusion clearly is consistent with policies favoring conservation of judicial resources and finality of judgments, and several courts have so held.

Thus, in *Southwest Airlines Co.* v. *Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977), eight private airlines sued in state court to prevent Southwest from continuing to operate at a Texas airport after the city of Dallas had unsuccessfully sued in federal court to exclude Southwest from the airport. The federal district court enjoined the state suit and the Fifth Circuit affirmed,

[40] *See generally Expert Elec., Inc.* v. *Levine,* 554 F.2d 1227, 1233 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *Gambocz* v. *Yelencsics,* 468 F.2d 837, 841 (3d Cir. 1972); *Jefferson School of Social Science* v. *Subversive Activities Control Bd.,* 331 F.2d 76, 83 (D.C. Cir. 1963); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Col. L. Rev. 1254, 1255 (1961).

holding that there was sufficient "congruence of interests" between the private airlines and the city for the former to be bound by the latter's failure to exclude Southwest from the airport in the prior federal case, *id.* at 100, and that "the proposition that governments may represent private interests in litigation, precluding relitigation, is clear," *id.* at 98. The court further noted:

> "To allow relitigation by [private] parties would surely defeat the res judicata policies identified above. First, it would add uncertainty to the status not only of Southwest but also of [other entities interested in the outcome of the first litigation]. If courts could second guess another court each time a new litigant, dissatisfied with the previous judgment, filed a new complaint, the respect of the previous parties or of the public toward the courts would inevitably decrease. Third, relitigation would continue to waste judicial resources and time, as it has already in the three post-judgment suits in this controversy. Fourth, Southwest and subsequent litigants would suffer the harassment and expense of still later lawsuits, as well as the possibility of numerous conflicting judgments." *Id.* at 101.

See also Broder v. *Pfizer, Inc.,* [1973-1] Trade Cas. (CCH) ¶ 74,268, at 93,271 (S.D.N.Y. 1972) ("enough is enough").

Similarly, in *Aerojet-General Corp.* v. *Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975), the plaintiff was held to be bound by a prior decision in which it had failed to intervene on the ground that its interests were "closely aligned" with those of the defendant in the first action, despite that defendant's failure to raise in the first case what the

plaintiff viewed as the crucial issue. *See also Roode* v. *Michaelian,* 373 F. Supp. 53, 55 (S.D.N.Y. 1974).

Here the requesters' interest in obtaining access to the information at issue was more than adequately protected. The CPSC is charged by statute to inform the public of consumer product safety hazards, *see* 15 U.S.C. § 2054, and maintains a pervasive "openness" policy of its own choice.[41] Indeed, the former Chairman of the CPSC has testified to the agency's perception of itself as "operating in a fishbowl." Hearings before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess., Ser. 83, 91 (1974).[42] With respect to the particular FOIA requests that gave rise to this litigation, the CPSC took the position not only that the information did not come within an exemption to the FOIA, but that it should be disclosed in any event. Moreover, on appeal *amicus curiae* Consumer Federation of America, another consumer group, represented the interests of the requesters on the merits (without objection from the manufacturers).[43] Under the circumstances, the Court of Appeals' concern that the pro-disclosure posi-

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[41] This is reflected in the opening to the agency's official brochure "Take a Close Look: The CPSC Openness Policy" (1976) ("You needn't resort to undercover operations to know what's going on in the U. S. Consumer Product Safety Commission.").

[42] The CPSC also has maintained before federal courts in two different circuits that the statutory provision upon which the manufacturers primarily rely does not apply to FOIA requests, appealing in both cases from decisions adverse to its position. *See Third Circuit Affirmance,* 598 F.2d 790 (lower court's decision affirmed); *Pierce & Stevens Chem. Corp.* v. *Consumer Prod. Safety Comm'n,* 585 F.2d 1382 (2d Cir. 1978) (lower court's decision reversed).

[43] *See* p. 9 & n.5 *supra.*

tion was not adequately represented in the Delaware litigation (*see* A. 13-14) was unwarranted.

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Indeed, the Court of Appeals' decision makes no sense considering the nature of reverse-FOIA proceedings as explicated by this Court in *Chrysler Corp.* v. *Brown,* —— U.S. ——, ——, 99 S. Ct. 1705, 1726 (1979). Such proceedings are in effect appeals from administrative determinations to release information, and thus normal rules governing such administrative appeals should apply. For example, 28 U.S.C. § 2348 provides that persons "whose interests are affected by [an] order of [certain agencies], may intervene in any proceeding to review the order" in a petition for review. If interested parties choose not to participate in review of an agency determination, they should be bound by the results of that review.

Indeed, in *Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486 (1968), this Court held that since

> "[a]ll parties with standing to challenge the [ICC's] action might have joined in the New York proceedings . . . it necessarily follows that the decision of the New York court which, with certain exceptions we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes." 389 U.S. at 505-06 (footnotes omitted).

See also Port of Boston Marine Terminal Association v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 72 (1970).

Additionally, at least one court of appeals has held, based on its interpretation of *National Licorice Co.* v. *NLRB,* 309 U.S. 350 (1940) and *Consolidated Edison*

Co. v. *NLRB,* 305 U.S. 197 (1938), that in an agency antitrust proceeding seeking to vindicate public rights against a private party, non-parties with an interest in the proceeding can be bound if they had notice and an opportunity to intervene. *PepsiCo, Inc.* v. *FTC,* 472 F.2d 179 (2d Cir. 1972) (Friendly, J.), *cert. denied,* 414 U.S. 876 (1973). In *PepsiCo* the plaintiff contended that it could not be ordered to cease and desist from imposing geographical sales restrictions on its bottlers in a proceeding from which the bottlers were absent because its compliance with the order might subject it to a suit by a bottler whose sales territory was invaded. The court rejected this contention, stating:

> "The proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency 'in order to safeguard their interests.' " 472 F.2d at 187-88.

As in *PepsiCo,* it is hard to believe that the requesters may now pursue an action seeking to compel the CPSC to do that which another district court of coordinate jurisdiction, and that district court's appellate court, have held to be in violation of the CPSC's own enabling act. This is particularly so when the Third Circuit has made an explicit finding that "[n]o lesser measure of relief [than the injunction entered by the Delaware court] would serve to protect the interests at stake and vindicate the [manufacturers'] legal right to have the Commission perform its duties under section

6(b)(1) of the Consumer Product Safety Act." *Third Circuit Affirmance,* 598 F.2d at 816."

If the District of Columbia Circuit's decision to allow the requesters in this case to prosecute their FOIA action after having deliberately ignored four years of litigation in Delaware and the Third Circuit is permitted to stand, a submitter of information to the government will never be able to provide sensitive information with any assurance that it or the government would be able to guarantee the confidentiality of the information. The successful prosecution of a reverse-FOIA action will no longer afford the submitter any final relief because a succession of future requesters could file additional suits seeking to compel release of the very same documents, none of them being bound by any of the prior judgments entered in earlier reverse or direct FOIA proceedings because he was not a party to those proceedings.[45] Reverse-FOIA proceedings will therefore

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[44] As the District of Columbia Circuit itself appears to recognize, "when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere" (A. 72).

[45] The District of Columbia Circuit claimed that the manufacturers could have achieved finality in the Delaware proceeding by naming the appellant-requesters as representatives of a defendant class consisting of "all possible requesters" (A. 79). This contention was made *sua sponte* without the benefit of any briefing or argument whatsoever and, in the words of the Solicitor General, "seems difficult to reconcile with the requirements of Fed. R. Civ. P. 23." Brief for Fed. Respondents in Opposition at 8, *citing Indianapolis School Comm'rs* v. *Jacobs,* 420 U.S. 128, 130 (1975). A class of all possible requesters would have been comprised of over two hundred million persons since any individual may at some unspecified future time request the documents at issue. However, a class cannot be defined "unless the description of it is sufficiently definite so that it is administratively feasible for the

become meaningless, a result clearly not contemplated by this Court. *See Chrysler Corp.* v. *Brown, supra,* —— U.S. at ——, 99 S. Ct. at 1726.

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court to determine whether a particular individual is a member." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1760 at 581-82 (1972); *see also Edwards* v. *Schlesinger,* 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom. Waldie* v. *Schlesinger,* 509 F.2d 508 (D.C. Cir. 1974); *American Servicemen's Union* v. *Mitchell,* 54 F.R.D. 14 (D.D.C. 1972). Moreover, it is doubtful that any FOIA requesters could have been named as defendants in the manufacturers' reverse-FOIA actions, since only the CPSC could provide the relief sought. Additionally, it would have been impossible to give constructive "notice" to members of the proposed class if such notice had been deemed necessary under Rule 23(d) to protect the absent members' rights. Finally, even joining the defendant class would not have insured finality of the judgment in any case, since even a judgment against a defendant class would have been subject to collateral attack by an absent member on the ground that the class lacked adequate representation. *See Gonzales* v. *Cassidy,* 474 F.2d 67 (5th Cir. 1973).

CONCLUSION

Wherefore, it is respectfully requested that the decision of the District of Columbia Court of Appeals be reversed and that the requesters' complaint be dismissed.

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